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Office of Legislative Counsel

18 JUL 1978

Mr. Simon Lazarus  
Associate Director  
Domestic Policy Staff  
The White House  
Washington, D. C. 20500

Dear Si:

In follow-up to our telephone discussion on Friday, 14 July 1978, let me outline for you our concerns with the House version of the Civil Service Reform legislation (H.R. 11280). This bill, now undergoing mark-up by the Post Office and Civil Service Committee, is troublesome primarily because of the lack of clear exemptions for CIA and other intelligence agencies from its provisions. Let me note these briefly for you:

1. On 29 June 1978, the Committee adopted an amendment to the 15 June 1978 Committee Print of H.R. 11280. The amendment, intended to serve as an exemption from Chapter I for CIA and NSA insofar as compliance therewith would be inconsistent with these agencies' charters, reads as follows:  
[On page 8, line 22, insert the following new sentence:]  
"Nothing in this section shall be construed to impair the authorities and responsibilities set forth in the National Security Act of 1947, as amended (50 U.S.C. 403), the Central Intelligence Agency Act of 1949, as amended (50 U.S.C. 403a et seq.), 50 U.S.C. 402 Note, and 50 U.S.C. 833." There are two problems with this language. First, the reference to "... this section ..." should be "... this chapter..." Without this change, there is no exemption for CIA or NSA from section 2303 of Chapter I, "Responsibility of the General Accounting Office." It is important that CIA and NSA be exempted from these provisions of Chapter I, consistent not only with their current statutory authorities but with what we believe to be the intent of this 29 June 1978 Committee amendment. (The General Counsel for the Committee has indicated verbally that this change is in accord with the Committee's intent and will be made; we have not yet seen this in writing.)

Second, the 29 June 1978 Committee amendment improperly cites the current statutes upon which the NSA exemption should be based. In lieu of "50 U.S.C. 402 Note, and 50 U.S.C. 833," the authorities are "Pub. L. 86-36, 73 Stat. 63, as amended, and Pub. L. 88-290, 78 Stat. 168, as amended."

2. In Title II, there is a serious problem regarding the potential reach of the authority of the proposed Special Counsel and the General Accounting Office to intelligence information and activities. Subsection 1206(c) provides authority for the Special Counsel and the Comptroller General to become involved in investigating alleged reprisals against Federal employees who disclose alleged abuses, illegalities or improprieties. Pursuant to subparagraph 1206(c)(1)(A), page 28 of the 15 June Committee Print, this authority does not extend to disclosures of alleged violations of any law, rule or regulation that are "prohibited by law or Executive order" (e.g., classified information or information involving intelligence sources and methods, which the Director of Central Intelligence is responsible for protecting from unauthorized disclosure, 50 U.S.C. 403(d)(3)). However, subparagraph 1206(c)(1)(B), also on page 28 of the 15 June Committee Print, which concerns not "any disclosure" as in (A) but disclosures to the Special Counsel or Inspectors General that relate to mismanagement, waste of funds, or abuse of authority, contains no provision similar to that in (A) which, in essence, "protects" only those disclosures that are "not prohibited by law or Executive order." We read this to mean the Special Counsel (and GAO) would have jurisdiction over any alleged reprisal for any disclosure by an employee under 1206(c)(1)(B), even involving information that is classified or protected by law against disclosure. In the case of the CIA, this would be inconsistent with present procedures based on the statutory authorities and responsibilities of the CIA and the Director of Central Intelligence. We therefore believe it essential that the following language which appears in subparagraph 1206(c)(1)(A) be added to subparagraph 1206(c)(1)(B): "... [such disclosure], not prohibited by law or Executive order..."

In addition, amendments to subsection 1206(c) adopted by the Committee during mark-up cause us concern; these amendments were proposed by Representatives Schroeder and Hanley. Subsection 1206(c) of H.R. 11280, as amended thus far during mark-up, would, among other things, and unlike the Senate bill: (1) authorize the Special Counsel to require an agency head to conduct investigations; (2) authorize the Special Counsel to require investigations of "related matters" (subparagraph 1206(c)(2)(B)); (3) require that agency heads submit very detailed reports of investigations; and (4) provide for access by the GAO to detailed investigative activities. Moreover, paragraph 1206(c)(3) could be construed to provide GAO an independent investigatory power. These provisions are of concern to us because they could all result in requiring access by external entities to intelligence information that is now protected by Executive Order or by provisions of the National Security and CIA Acts, as amended (e.g., 50 U.S.C. 403(d)(3), 50 U.S.C. 403g, and 50 U.S.C. 403j). These problems could be remedied by the amendment suggested above to subparagraph 1206(c)(1)(B), and by striking the word "further"

from the amendment to paragraph 1206(c)(3) proposed by Representative Schroeder (page 29, line 13 of the 15 June 1978 Committee Print). This latter change would remove the implication that national security information would be disclosed by an agency, GAO, or the Congress.

3. We are concerned also that the requirement in subsection 1206(e), that the Special Counsel publish a "list of noncriminal matters referred to agency heads" (lines 19 through 21 of page 30 of the 15 June 1978 Committee Print), does not make clear that information protected against disclosure by law or Executive Order shall not be included in such public list.

Since it may not always be clear on the face of the information concerning alleged violations or improprieties which the Special Counsel may receive that classified or otherwise protected information is contained therein, it should be clarified--by amendment or by Report language, or both--that the provision is not intended to authorize the Special Counsel to disclose information that is classified or is protected against disclosure by statute. The matters that would be contained in such a public list by the Special Counsel would constitute only information he had received under his investigatory jurisdiction described in this section (the report should make this point clear). To ensure that no information that is classified or protected against disclosure by statute is contained in a public list, it should be made clear that the Special Counsel, prior to including any information in a public list, shall consult with the head of the agency involved to determine if any classified or protected information is involved, in which case the information shall not be included in a public list.

4. There is an additional serious problem with respect to section 1206. Subsection 1206(f) authorizes the Special Counsel to investigate certain specified categories of allegations other than those for which he is authorized elsewhere in section 1206. Whether this subsection would or is intended to provide the Special Counsel authority not now enjoyed by the Civil Service Commission is not clear. Since the CIA, as an excepted service, now has responsibility to enforce restrictions against political activity by its employees, on its face subparagraph 1206(f)(1)(A) would appear to provide new authority for the Special Counsel at least insofar as such matters are concerned. In the case of CIA and NSA, which currently are exempt from many civil service laws and regulations based on these agencies' statutes, we object to any legislation which would go beyond current laws and procedures insofar as additional external access to intelligence information and activities is concerned. It is therefore important to amend this subsection accordingly.

5. Two new titles to H.R. 11280 have been proposed-- Title VII on labor-management relations and Title VIII on Hatch Act reform. While the Administration's 12 May 1978 proposed Title VII included, in subsection 7162(c), exemptions for intelligence agencies, the Committee Print of Title VII (the most recent version which we have is dated 10 July 1978) contains a much narrower, and unacceptable, exemption for certain intelligence employees. It is essential that we have a complete exemption such as contained in the Administration's proposed Title VII.

6. Although it is uncertain whether the Committee will include a title on Hatch Act reform, here too, it is important that intelligence agencies be excluded from such legislation. Enclosed is a copy of the report on Hatch Act reform legislation (H.R. 10) sent to Senator Ribicoff from the Director, and dated 7 April 1978, providing more detailed reasons for this position; the recommendations in this letter were coordinated with the Interagency Task Force [on Hatch Act reform].

7. Finally, there are several provisions in Title II of H.R. 11280 that we believe require report language to clarify ambiguities insofar as these may impact on intelligence equities. For example: language making clear, in section 204(a), that, notwithstanding the provisions of this bill, the CIA would continue to remain completely exempt from all laws regarding preference eligibles; language making clear that the Special Counsel is not given broad authority, pursuant to subparagraph 1206(f)(1)(C), to investigate any withholding of information under 5 U.S.C. 552 (perhaps this cite should be "5 U.S.C. 552(a)(4)(F)"); and language noting that chapter 77 ("Appeals") is not intended to affect current exemptions from civil service statutes as these relate to appeals, and that the only basis for any new rights of appeal would be pursuant to this legislation.

All of these views are consistent with the actions taken thus far by the Senate Governmental Affairs Committee, and with the positions expressed in the Administration reports on this legislation, from Civil Service Commission Chairman Campbell, dated 17 and 22 May 1978, which recommended that intelligence agencies be exempt from the terms of these bills. Incidentally, although the bill as ordered reported by the Senate Committee contains clearer exemptions for intelligence agencies, there are several provisions in the Senate report that present serious problems for us.

We stand ready to discuss these problems with you to ensure that things remain on track. If you would like, we could also discuss our concerns with the Special Prosecutor legislation, H.R. 9705. Thank you for your help.

Sincerely,



Frederick P. Hitz  
Legislative Counsel

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Enclosure

*Si: I know you are under the  
gun to get this out of Udall's  
Committee today but these  
are our concerns. Would  
appreciate what you can do.*

*JH*

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7 April 1978

Honorable Abraham Ribicoff, Chairman  
Committee on Governmental Affairs  
United States Senate  
Washington, D.C. 20510

Dear Mr. Chairman:

This letter is in response to your request for views on H.R. 10, S. 80 and S. 980, bills to increase the participation of Federal civilian and Postal Service employees in the political process of the country and to protect such employees from improper political solicitations.

I defer comment on the merits of the question of the rights of Government employees generally to engage in political activities. I wish, however, to make several comments concerning the impact which each of these bills would have on the Government's foreign intelligence activities.

The Central Intelligence Agency produces national foreign intelligence for policy makers in the Federal Government. The usefulness and credibility of CIA's product depends in part upon its preserving both the appearance and the substance of impartiality. Even a hint of possible bias, such as could result from participation in politics by Agency employees, could damage the Agency's credibility. These same problems face each intelligence organization which produces national foreign intelligence. For these reasons, I support continued restrictions on the political activities of employees of intelligence organizations.

The provisions of S. 80, which establish regulations for employees of the CIA, recognize these very concerns. The bill would continue current restrictions on the political activities of CIA employees unless the Director of Central Intelligence determines by regulation that participation in political activities would not "adversely affect the integrity of the Government or the public's confidence in the integrity of the Government." As head of the CIA, I have no objections to this feature of S. 80.

S. 980 would permit Federal employees to engage in local partisan political activities and to hold local elective office. As indicated above, I believe employees of intelligence organizations should not participate in any partisan political activity. For this reason, I must object to passage of S. 980 in its present form.

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Although H. R. 10 recognizes to some extent the need to limit the political activities of intelligence employees, I believe its provisions are inadequate. In addition, I must oppose the method the bill would establish for implementing restrictions on political activities by these employees. H.R. 10 would limit the political activities of employees whose positions fall in the category of "restricted positions." This category includes "any position [in which] the duties and responsibilities ... require [an] employee as a substantial part of his official activities to engage in foreign intelligence activities relating to national security." The Civil Service Commission would determine by regulation which positions meet the criteria, and an employee could challenge the determination in court. The overall mission of the CIA and other intelligence organizations clearly fits this vague criteria for a "restricted position," but this may or may not be true of all the activities of each individual employee. Because of this potential contradiction between each organization's overall activity and an individual employee's responsibility, applications of the standard would be difficult and could have the contentious and inequitable result of limiting the activities of some employees but not others. In addition, if even some employees were permitted to engage in other than local non-partisan political activities, the door would be open to damaging charges that the organization is "infiltrating" political campaigns and to questions about the impartiality of its product.

Implementation of the provisions of this bill could also conflict with the statutory responsibility of the Director of Central Intelligence to protect intelligence sources and methods from unauthorized disclosure (50 U.S.C. 403(d)(3)) and with the CIA's exemption from the provisions of any law which requires the publication or disclosure of CIA organization, functions or official titles (50 U.S.C. 403(g)). For example, the Civil Service Commission would investigate and then issue regulations stating which positions in the Agency require the incumbent to engage in "foreign intelligence activities relating to national security." This process apparently would require submission of organizational and functional data, thereby resulting in a proliferation of access to protected information, and increasing the risk of disclosure. Further, the regulations eventually issued might very well result in disclosure of positions within the Agency which are themselves classified. The same dangers arise from investigations and prosecution of alleged violations of the legislation, as well as from the provision of proposed section 7330(a) of H. R. 10 permitting an employee to challenge the classification of his position in court.

These problems would be solved by an amendment which makes clear that "restricted positions" includes all employees of an intelligence organization. Such an amendment would insure equality in the treatment of employees, guarantee the appearance of impartiality in products and, by eliminating the need for hearings by the Civil Service Commission, greatly reduce the potential for disclosure of sensitive information. I am enclosing proposed amendatory language to accomplish this. Further, I have enclosed for possible inclusion in the report accompanying the bill, language listing those agencies which are covered by the proposed amendment. Both the proposed amendment and the report language have been developed in conjunction with the Department of Defense and the Office of Management and Budget.

The Office of Management and Budget has advised there is no objection to the submission of this report from the standpoint of the Administration's program.

Yours sincerely,

/s/ Stansfield Turner

STANSFIELD TURNER

Enclosure



AMENDMENT TO H. R. 10

Pages 5 and 6, strike out all of §7322(9) beginning at page 5, line 3 and continuing through page 6, line 19 and insert in lieu thereof:

"(9) 'restricted position' means--

"(A) any position within an agency (or component of an agency) if the primary function of such agency or component thereof is engaging in foreign intelligence or counterintelligence activities;

"(B) any position with respect to which there is in effect a determination by the Commission, by regulation, that--

"(i) the duties and responsibilities of such position require that incumbent in the normal course of carrying out such duties and responsibilities--

"(I) to make decisions binding on employees with respect to whom he or she is a superior with regard to who shall be the subject of any action which is to be taken by any such employee in connection with the enforcement of any civil or criminal law (including any inspection or audit under any such law); or

"(II) to actually carry out any such action; or

"(III) to make a final determination with respect to any such action; or

"(IV) to make any substantial determination with respect to who shall be awarded contracts which are for the procurement of goods or services for the Government and which have substantial monetary value or who shall be awarded licenses, grants, subsidies, or other benefits, which involve funds or other interests having a substantial monetary value; or

"(V) to supervise individuals engaged in the awarding, administering, or monitoring of such contracts, licenses, grants, subsidies, or benefits;

"(C) any position with respect to which there is in effect a determination by the Secretary of State, by regulation, that the position is in the Department of State, the United States Information Agency, the Agency for International Development, the Arms Control and Disarmament Agency, or the Peace Corps, and--

"(i) the duties and responsibilities of such position meet the requirements of paragraphs (A) or (B) of this subsection, or

"(ii) the duties and responsibilities of such position normally require the officer or employee holding such position to devote a significant portion of his or her time to representing the United States in discussions or negotiations with representatives of foreign governments or international organizations, or require such officer or employee to exercise discretion in the determination or execution of foreign policy;

"(D) any position with respect to which there is in effect a determination by the Commission, by regulation, upon consultation with the Secretary of State, that the position is in an agency other than those described in paragraph (C) of this subsection and requires the performance of duties and responsibilities similar to those described in paragraph (C)(ii) of this subsection;

"(E) any position with respect to which there is in effect a determination by the Commission, by regulation, that the position is in the Internal Revenue Service (including the Office of Chief Counsel) and is not otherwise included within the provisions of this subsection and such position involves--

"(i) the exercise of discretion in

"(I) the determination, assessment, or collection of taxes under title 26, United States Code;

"(II) the preparation or review of interpretative opinions with respect to title 26, United States Code; or

"(III) establishing programs concerning the allocation or use of appropriated funds or personnel to specific aspects of the administration and enforcement of the internal revenue laws; or

"(ii) access to return, return information or taxpayer return information, as those terms are defined in 26 U.S.C. 6103(b)(1), (2), and (30, which identifies a specific taxpayer or group of taxpayers; and

"(F) with respect to any position under paragraphs (B), (D), or (E) of this subsection, the Commission determines that the restrictions on political activity imposed on such employee in such position are justified in order to insure the efficiency or integrity of the Government or the public's confidence in the efficiency or integrity of the Government."

Suggested Language for Inclusion in Report in Explanation of Phrase "Agency ... engaging in foreign intelligence or counterintelligence activities," §7322(9)(A) at page 5 of H.R. 10

"The term 'Agency...' includes the following agencies, departments and components of the Federal Government:

- A. Central Intelligence Agency;
  - B. National Security Agency;
  - C. Defense Intelligence Agency;
  - D. Offices within the Department of Defense for the collection of specialized national foreign intelligence through reconnaissance programs;
  - E. Intelligence elements of the military services;
  - F. Intelligence elements of the Federal Bureau of Investigation;
  - G. Bureau of Intelligence and Research of the Department of State;
  - H. Intelligence elements of the Department of the Treasury;
  - I. Intelligence elements of the Department of Energy;
  - J. Intelligence elements of the Drug Enforcement Administration;
- and
- K. Staff elements of the Office of the Director of Central Intelligence that support execution of the Director's Intelligence Community responsibilities."